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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

EDWIN W. EDWARDS, in his Official Capacity as Governor of Louisiana; WILLIAM J. GUSTE, JR., in his Official Capacity as Attorney General of Louisiana; LOUISIANA DEPARMENT OF EDUCATION; and THOMAS G. CLAUSEN, in his Official Capacity as Superintendent of Education of Louisiana,

Appellants,

VS.

DON AGUILLARD, et al.,

Appellees.

On Appeal from the United States Court of Appeals
For the Fifth Circuit

[redacted] BRIEF OF AMICI CURIAE REVEREND BILL MCLEAN, BISHOP KEN HICKS, RIGHT REVEREND HERBERT DONOVAN, AND MOST REVEREND ANDREW J. MCDONALD

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MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE

The amici curiae herein, the Reverend Bill McLean, Bishop Ken Hicks, the Right Reverend Herbert Donovan, and the Most Reverend Andrew J. McDonald, hereby respectfully move for leave to file the attached brief of the amici curiae in this case. The consent of counsel for the appellees has been obtained. The consent of counsel for the appellant has not been obtained.

The four amici curiae are clergy who were plaintiffs in the case styled *McLean v. Arkansas Board of Education,* 529 F.Supp. 1255 (E.D. Ark. 1982), a case in which the Arkansas "Balanced Treatment for Creation Science and Evolution Science Act," Act 590 of 1981, was invalidated as a violation of the Establishment Clause of the First Amendment to the United States Constitution. The Arkansas statute was nearly identical to the Louisiana statute requiring "balanced treatment" for "creation science" and "evolution science" in the Louisiana public schools.

Each of these clergy has an interest as a citizen, taxpayer, and leader of a religious denomination in Arkansas in the separation of Church and State. The amici would be adversely affected if the Court upheld the Louisiana statute at issue in this case. The brief of the amici will focus on the similarities between the Arkansas and Louisiana statutes and the discriminatory effect of the statute on non-fundamentalist sects.

Respectfully submitted,

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INTEREST OF THE AMICI

The amici curiae herein are each clergy of Christian denominations who participated as plaintiffs in the case styled *McLean v. Arkansas Board of Education,* 529 F.Supp. 1255 (E.D. Ark. 1982), the case in which the Arkansas "Balanced Treatment for Creation Science and Evolution Science Act," Act 590 of 1981, was struck down as a violation of the Establishment Clause of the First Amendment to the Constitution of the United States. Each of the amici are deeply religious and believe that religion is important in personal, family, and community life.

The Reverend Bill McLean is an ordained minister in the Presbyterian Church and is the former head of the Presbyterian Church in Arkansas. Bishop Ken Hicks is a Bishop in the Methodist Church and is a former resident of Arkansas, where he presided over the United Methodist Church there. Bishop Hicks attempted unsuccessfully to testify before the Arkansas State Legislature in opposition to the Arkansas Creationism Act, Act 590 of 1981. The Right Rev. Herbert Donovan is the Bishop of the Episcopal Diocese in Arkansas and an Arkansas resident. The Most Rev. Andrew J. McDonald is the Bishop of the Catholic Diocese in Little Rock, Arkansas, and a resident of Little Rock, Arkansas.

Each of these religious leaders has a significant interest as citizens, taxpayers, and clergy in the preservation of the First Amendment and, specifically, in the separation of Church and State. Moreover, each holds the firm conviction that religion is strengthened by its complete separation from government, and that government-supported education in science is strengthened by its complete separation from religious doctrine. Additionally, these amici curiae possess a genuine interest in the resolution of this constitutional issue because state entanglement with fundamentalist religious doctrine has the clear unmitigated effect of discriminating against other religions and beliefs, including the congregations these amici represent.

Each of these amici was a plaintiff in *McLean, supra,* and each testified regarding the nature of creationism in Arkansas Act 590, a statute which bore remarkable similarity to the Louisiana creationism statute. The amici believe that the study of the theory of evolution and the practice of their religious beliefs are entirely compatible and, therefore, take offense to the position espoused by appellants herein that belief in evolution and belief in a Creator are mutually exclusive.

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STATEMENT OF THE CASE

This Court is presented with the issue of whether the State of Louisiana violated the Establishment Clause of the First Amendment by enacting into law, Act 685 of 1981, the Louisiana creationism or "balanced treatment" Act. This statute re-

quired that students in the Louisiana public schools be taught "creation science" or be deprived of an education in the theory of evolution. Appellees, a group of Louisiana educators, taxpayers, and parents of school children in the Louisiana public school system, challenged Act 685 on constitutional grounds. They were later joined by the Louisiana Board of Elementary and Secondary Education and by the Orleans Parish School Board. The district court for the Eastern District of Louisiana, Judge Duplantier presiding, granted summary judgment for the plaintiffs declaring the Act to be in violation of the Establishment Clause of the First Amendment. The Court held that the Creationism Act was unconstitutional on its face as it entailed the teaching of the existence of a Creator, and was not only religious, but also discriminatory in favor of a particular religious sect. The Court held that the statute could not withstand constitutional scrutiny and enjoined its enforcement and implementation.

On appeal, the Court of Appeals for the Fifth Circuit certified the question of the law's constitutionality to the Louisiana Supreme Court, which found no violation of the Louisiana Constitution. The Fifth Circuit then remanded the matter to the district court with instructions to address federal constitutional questions. *Aguillard v. Edwards,* 720 F.2d 676 (5th Cir. 1984). On remand, the district court invalidated the statute as unconstitutional and appeal was taken. The Fifth Circuit ultimately held that the statute had as its purpose the promotion of a religious belief, and violated the Establishment Clause of the First Amendment.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(2). The State of Louisiana petitioned the Fifth Circuit Court of Appeals for rehearing *en banc* which was denied on December 12, 1985. *Aguillard v. Edwards,* 778 F.2d 225 (5th Cir. 1985). Notice of appeal was filed on December 23, 1985, from the denial. On May 5, 1986, this Court noted probable jurisdiction. The appeal of the State is premised on a pro-

cedural issue and a constitutional issue. The procedural claim is merely that genuine issues of material fact precluded summary judgment. The state has framed the constitutional issue as whether the Creationism Act is constitutional under the Establishment Clause, analyzed under either the tripart test articulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), or under an alternative "historical" test.

SUMMARY OF ARGUMENT

The Louisiana Creationism Act (Act 685 of 1981) violates the Establishment Clause of the First Amendment because it violates each prong of the *Lemon* test: it reflects a religious, rather than a secular, purpose; its primary effect is the advancement of religion; and it fosters excessive administrative and political government entanglement with religion.

The statute also unconstitutionally violates "academic freedom" under the First and Fourteenth Amendments and discriminates against non-fundamentalist religious sects because it favors and espouses the religious tenents of the fundamentalist movement and lends the considerable power of the State to those religious tenents. The Act violates the separation of Church and State and enables the State to inculcate particular religious values in the Louisiana public school system.

Moreover, the Act serves absolutely no secular purpose, and the legislative history and the plain language of the Act reflect this fact. The Act is far more serious and pervasive a violation of the Establishment Clause than the simple reference to a Creator or deity in a ceremony or a prayer recited in a classroom, because it actually facilitates the teaching of religious theory. The Act is an unconstitutional establishment of religion with its primary goal as the elimination of evolution theory from the public school curricula. It cannot withstand constitutional scrutiny under any test. Thus, the decision of the Fifth Circuit Court of Appeals must be upheld.

ARGUMENT

I. The Louisiana Creationism Act, Act 685 Of 1981, Violates The Establishment Clause Of The First Amendment.

The Establishment Clause forbids government to "pass laws which aid one religion, aid all religions, or prefer one religion over another." *Everson v. Board of Education* 330 U.S. 1, 15 (1947). In *Engel v. Vitale,* 370 U.S. 421, 431 (1962), Mr. Justice Black identified the objective of the Establishment Clause: "Its first and most immediate purpose rest[s] on the belief that a union of government and religion tends to destroy government and to degrade religion." The Establishment Clause was intended, in the words of Thomas Jefferson, to erect "a wall of separation between church and state." *Everson, supra,* 330 U.S. at 16. Act 685, the Louisiana Creationism Act, violates the Establishment Clause under each prong of the three-prong test developed by this Court:

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion...; finally, the statute must not foster "an excessive government entanglement with religion."

Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (citations omitted).

A comparison of the Louisiana Creationism statute and Arkansas Act 590 reveals the near-identity of the two statutes. In fact, Section 4(a) of Act 590 defines, in the first sentence, "creation science" as "the scientific evidences for creation and inferences from those scientific evidences," language identical to the full text definition of "creation science" articulated in Section 286.3(2) of Louisiana Act 685. Both statutes, which were drafted by Paul Ellwanger, authorize "balanced treatment" of creationism and evolution in the public schools; both declare their purpose as "protecting academic freedom;" both

rely on the definition of "evolution science" as "the scientific evidences for evolution and inferences from those scientific evidences." The primary difference between the two statutes lies in the elaboration by Act 590 of six (6) "scientific evidences" and six (6) "creation science" evidences, which is missing from the Louisiana Act.

The amici curiae have a particular interest in the constitutional resolution of this issue because they testified in *McLean,* were plaintiffs with extensive familiarity with the Arkansas statute, and have a particular interest as clergy in the separation of Church and State.

A. The Louisiana Creationism Act reflects a religious, rather than a secular, purpose.

To survive Establishment Clause scrutiny, a statute must have both a secular purpose and a primary secular effect. *Lynch v. Donnelly,* ____ U.S. ____, 104 S.Ct. 1355, 1362 (1984). The "secular purpose" requirement is not satisfied by the mere existence of *some* secular purpose if it is shown that a state legislature's actions were dominated by a religious purpose. *Id.* at 104 S.Ct. at 1368 (O'Connor, J. concurring); *Stone v. Graham,* 449 U.S. 39, 41 (1980). If the primary purpose of the state action is to either endorse or disapprove of religion, the first prong of the *Lemon* test will not be satisfied. *Wallace v. Jaffree,* ____ U.S. ____, 105 S.Ct. 2479, 2490, 86 L.Ed.2d 29 (1985); *Lynch,* 104 S.Ct. at 1368.

The Louisiana Creationism Act furthers a religious purpose and is unconstitutional for the same reasons that this Court invalidated, in *Epperson v. Arkansas,* 393 U.S. 97 (1968), the Arkansas statute that prohibited public school instruction on evolution. Even though the Arkansas statute did not expressly mention religion or religious dogma, this Court held the statute unconstitutional under the Establishment Clause because its sole purpose was to "blot out a particular theory because of its supposed conflict with the Biblical account, literally read," of

the origin of man and the world. *Id.* at 109. In *Epperson*, this Court stressed that public school education cannot be tailored to conform to the beliefs of any religion:

> [T]his prohibition is absolute. It forbids alike the preference of a religious doctrine or the prohibition of a theory which is deemed antagonistic to a particular dogma.

Id. at 106-107.[1] (Citations omitted).

The State of Louisiana has stated, in Section 286.2, that the purpose of the Creationism Act is to protect academic freedom. The Act further elaborates on the methods by which this purpose is to be achieved: e.g., the enforcement of "balanced treatment" of "creation science" and "evolution science," in textbooks, lectures, library materials, and educational programs in the public schools.[2]

But as this Court recognized in *Stone, supra,* statements of secular purpose for statutes alleged to promote religion in the public schools must be subject to vigorous, scrutiny. *See, e.g., School District of Abington v. Schempp,* 374 U.S. 203 (1963). In the instant case, the Act's plain language reflects that religious considerations formed its basis. *Committee for Public*

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[1] Following this Court's decision in *Epperson,* the religious Fundamentalists attempted to inject an explicitly Biblical account of the origin of life into public school curricula in Tennessee. In *Daniel v. Waters,* 515 F.2d 485 (6th Cir. 1975), the Sixth Circuit invalidated a statute that prohibited the use of any textbook discussing any theory of the origin of life unless that textbook presented all theories, including the Genesis account, and unless evolution was identified as theory and not fact. *Accord, Steele v. Waters,* 527 S.W.2d 72 (Tenn. 1975) (state court decision invalidating same statute).

[2] Section 286.3 defines "balanced treatment," in pertinent part, as "providing whatever information and instruction in both creation and evolution models the classroom teacher determines is necessary and appropriate to provide insight into both theories..."

Education and Religious Liberty v. Nyquist, 413 U.S. 756, 773 (1973); *McGowan v. Maryland,* 366 U.S. 420 (1961). Moreover, the source of the Act, the historical opposition of creationism to evolution theory, and the legislative history to the Act's passage evidence a religious purpose.[3] The basis for the Act was the Model Balanced Treatment Act, drafted by Paul Ellwanger, president of an organization of creation scientists called Christians for Fairness in Education.

This model was also the source of the Arkansas Creationism statute struck down in *McLean v. Arkansas Board of Education,* 529 F.Supp. 1255 (E.D. Ark. 1982), but the Louisiana statute contains no overt references to religion and calls for the balanced treatment not of evolution and "the Genesis account of creation" but of "evolution science" and "creation science." The apparent lesson learned by the creationists is that explicit references to religion must be avoided and creationism should be cloaked in the language of science.

Nonetheless, the balanced treatment approach which was initially presented to the Louisiana legislature did not even attempt to disguise its purpose of injecting a religious view of the origins of man and the universe into Louisiana's public schools. State Senator Keith's initial draft, Senate Bill No. 956, introduced in 1980, required balancing the theory of evolution with the

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[3] In determining the legislative purpose of a statute, the Court may consid - statements by the Act's sponsor, *Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548 (1976), and the circumstances surrounding the enactment, including the historical context, *United States v. Wise*, 370 U.S. 405, 411 (1962); *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977). The Fifth Circuit noted on this subject,

> Nor can we ignore the fact that through the years religious fundamentalists have publicly scorned the theory of evolution and worked to discredit it. *Aguillard v. Edwards*, 765 F.2d 1251, 1256 (1985).

theory of "creation *ex nihilo*," which Senator Keith identified as "scientific creationism." *See, McLean,* 529 F.Supp. at 1265 ("creation of the world 'out of nothing' is the ultimate religious statement because God is the only actor.").[4] Even absent the explicit references to religion, the Act is not transformed into science and no scientific purpose is expressed in its core language.

The Creationism Act amounts to the legislative enactment of a religious antipathy to evolution. It reflects no clear secular purpose but instead exists only because of "fundamentalist sectarian conviction," *Epperson,* 393 U.S. at 108. It is not merely consistent with fundamentalist views, but promotes beliefs held *only* by fundamentalists and which have no independent secular basis.

B. The primary effect of the Creationism Act is to advance religion.

A statute is unconstitutional under the Establishment Clause if it "has the direct and immediate effect of advancing religion...[rather than] only a remote and incidental effect advantageous to religious institutions." *Committee for Public Education & Religious Liberty v. Nyquist, supra,* 413 U.S. at 784, n.39 (1973). Courts have been particularly sensitive to the use of public schools for the promotion of religious activities, such as prayer, Bible readings, and religion lessons, and have held these to be unconstitutional, as well as the more subtle attempts to advance essentially religious beliefs through public school instruction. *Stone, supra, Epperson, supra.*

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[4] The lead witness for the bill testified that "scientific creationism" "postulates that everything was created by some intelligence or power external to the universe."

1. Instruction in "Creation Science" Advances Religion.

The Louisiana Creationism Act requires that the Louisiana Public schools, in effect, *assist* the efforts of religious fundamentalists in furthering the dissemination of "creation science", an inherently religious view of the origins of life and the universe. Teaching "creation science" advances religion because the theory of "creation" invokes and relies upon the existence and activity of a creat*or* (a concept which necessarily implies a Supreme Being), and because it reflects a religious view of the origins of the universe which is unique to fundamentalists.[5] The Fifth Circuit recognized that while the theory of creation may not be to all people exclusively a "religious tenent," it is equally true that the theory of creation is a "theory embrace[d] by many religions." *Aguillard,* 765 F.2d at 1256.

The "creation science" theory advanced by the Louisiana statute, if taught in the Louisiana public school system, would have the clear and immediate effect of advancing religion, because "creation science" inculcates religious beliefs, particularly those beliefs which derive from a literal reading of the Bible. Even those "creation science" treatises which avoid use of the words "God" and "divine creation", speak of a

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[5] Key passages from leading "creation science" treatises readily admit this link:

> If creation is really a fact, this means there is a Creator, and the universe is His creation.

Henry M. Morris, *Scientific Creationism,* Creation-Life Publishers (1980), p. 203.

> By creation, we mean the bringing into being by a supernatural creator the basic kinds of plants and animals by the process of sudden, or fiat, creation.

Duane Gish, *Evolution? — The Fossils Say No!,* Creation-Life Publishers (1978).

"creator" and a "special creation." A "creator" is indistinguishable from a "supreme Being" or "God". The effect of teaching such doctrines is to destroy the neutrality the Establishment Clause exacts by giving preference to a particular religious view.

2. Instruction in Creation Science Advances No Secular Educational Goal Because Creation Science is not Science.

The Louisiana Act, in authorizing "balanced treatment" of both "creation science" and "evolution science" states that both models must be taught whenever the subject of the "origin of man, life, the earth, or the universe" is discussed.[6] But "creation science" is not science in method or content. Unlike scientists, who start with facts and formulate theories based on those facts, creationists start with divine revelation and evaluate data within that religious framework.[7] Where it is basic to the

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[6] The definition of "creation science" as defined in Section 4(a) of Act 590 of 1981, the Arkansas "Balanced Treatment for Creation Science and Evolution Science Act more explicitly (if without actual named reference) draws from the first eleven chapters of the Book of Genesis. By referencing the specific "scientific evidences and related inferences" raised by creation science as stated in Arkansas' Act 590, e.g. (1) sudden creation of the universe, energy, and life from nothing; (2) the insufficiency of mutation and natural selection...(3) changes only within fixed units of originally created "kinds" of plants and animals; (4) separate ancestry for man and apes; (5) explanation of the earth's geology by catastrophism, including the occurence of the worldwide flood, and (6) a relatively recent inception of the earth and living "kinds", the Arkansas Court drew the immediate connection to the Genesis account.

[7] Creationists have been unsuccessful in attempts to draft teaching materials expounding the so-called "secular" version of creation science. In *McLean,* the Court referred to testimony regarding attempts by a local school board curriculum committee to devise a secular creation-science curriculum. The Court stated, "The curriculum guide...cannot be taught and has no educational value as science." *McLean,* 529 F.Supp. at 1270-72.

definition of science that it concern itself solely with *natural phenomena* and natural processes, "creation science" relies on supernatural processes. Most importantly, science remains essentially *tentative,* subject to revision in light of new discoveries, while creationism espouses absolute truths and dogma.

The two-model approach espoused by the Institute for Creation Research[8] and taken verbatim from ICR writings, is actually an extension of the fundmentalist position that one must either accept the literal interpretation of Genesis or accept the inherently "godless" system of evolution. Adherents to creation science insist that a true Christian cannot compromise with the theory of evolution and that the Genesis story and the theory of evolution are mutually exclusive. The Amici submit that on the contrary, evolution does not presuppose the *absence* of a creator or a God. The premise that individuals must be against religion, atheist, or "godless" is offensive to the religious views of many, including the amici herein.[9]

Creation science eschews the scientific method, and has no educational value as science. Since creation science cannot be classified as science, the conclusion becomes inescapable that the primary effect of the Act is to advance religion. As such, it is prohibited by the Establishment Clause. *Schempp,* 374 U.S. at 306. The Act goes far beyond even such constitutionally in-

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[8] The leading creationist organization in the country is the Institute for Creation Research (ICR), which is affiliated with the Christian Heritage College and supported by the Scott Memorial Baptist Church in San Diego, California. The ICR is the leading publisher of creation science material, and Henry M. Morris is ICR's Director.

[9] In *McLean,* the Arkansas "creation science" litigation, Dr. Francisco Ayala, a geneticist of considerable renown and a former Catholic priest with a Doctorate in Theology, pointed out that many working scientists who subscribe to the theory of evolution are devoutly religious.

firm activities as prayer in the public schools, because it authorizes religious doctrine as a daily educational staple in the public school classroom. Finally, the Act expresses a sectarian effort to eliminate the teaching of evolution in the public schools. This, the amici submit, is the ultimate long-term purpose of the Act. Statements of the Act's proponents reflect the same religiously-motivated goal of barring the teaching of evolution that was held to violate the Establishment Clause in *Epperson, supra.* 393 U.S. at 97.[10]

The chief architect for the Louisiana statute, Paul Ellwanger, has candidly stated that the purpose for enacting creation science legislation is to abolish evolution in the public schools by whatever means necessary to achieve their goals.[11] It is crystal-clear that creationist organizations consider the introduction of creation science into the public schools part of their ministry. *McLean,* 529 F.Supp. at 1260.

The Creationism Act lends the authority of the State to the purported scientific legitimacy of the Biblical account of creation. Its requirement of "balanced treatment" of "creation

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[10] Prior to the trial in *McLean,* Paul Ellwanger, in a letter to Senator Keith, revealed his belief that one passage and implementation of Act 590 was a religious crusade: "I view this whole battle as one between God and anti-God forces, though I know there are a large number of evolutionists who believe in God." And further, "...it behooves Satan to do all he can to thwart our efforts and confuse the issue at every turn." *McLean,* 529 F.Supp. at 1270.

[11] In a letter written to Pastor Robert E. Hays, a Little Rock, Arkansas, minister, Mr. Ellwanger states:

> While neither evolution nor creation can qualify as a scientific theory, and since it is virtually impossible at this point to educate the whole world that evolution is not a true scientific theory, we have freely used these terms—the evolution theory and the theory of scientific creationism—in the bill's text." *McLean,* 529 F.Supp. at 1270.

science" and "evolution science" forces teachers either to forego the teaching of any subject that bears on "the origin of man, life, the earth, or the universe," or to indoctrinate students with a belief in the literal truth of Genesis. The latter is the teaching *of* religion, which is prohibited by the Establishment Clause. *Schempp,* 374 U.S. at 306. While teaching *about* religion is permissible under the Establishment Clause, there is a clear distinction to be drawn between literary, patriotic, ceremonial, or historical references to a God or a Creator, which neither encourage nor require professions of belief, and the indoctrination of public school students in belief in a Creator. *Engel v. Vitale,* 370 U.S. at 435; *Meek v. Pittenger,* 421 U.S. 249 (1975).

Nor does the Act insure religious neutrality. Rather, by requiring public school instruction to comply with a model of "origins," Louisiana has demonstrated a state preference for fundamentalist orthodox religious beliefs. A state cannot, through its schools, place "the power, prestige, and financial support of government...behind a particular religious belief" and still survive constitutional scrutiny. *Id.* at 431.

C. The Creationism Act creates an excessive entanglement between the State and religion.

"Excessive entanglement" between religion and government will invalidate a statute under the Establishment Clause. *Lemon,* 403 U.S. at 612-13. This may be either *administrative* entanglement (requiring constant state vigilance to prevent the promotion of religion), or *political* entanglement (the potential for dividing the political electorate on the basis of citizens' religious beliefs). In the instant case, both types of entanglement are present. Section §286.6 of the Act provides:

> Existing library acquisition funds shall be used to purchase non-religious library books as are necessary to give balanced treatment to the creation science model and the evolution science model.

Section 286.7, "Curriculum Development", provides, in pertinent part:

> (A) Each city and parish school board shall develop and provide to each public school classroom teacher in the system a curriculum guide on presentation of creation science.

Finally, Section 286.4(A) provides, in pertinent part:

> When creation or evolution is taught, each shall be taught as a theory, rather than as proven scientific fact.

As this Court emphasized in *Lemon,* however entangling judgments on specific textbooks may be, the monitoring of classrooms is even more problematic. In *Lemon,*[12] this Court held unconstitutional a state law permitting state purchase of secular educational services from non-public schools, including parochial schools, because the monitoring necessary to enforce the statute's restrictions against religious instruction would hopelessly entwine the State and religion:

> A comprehensive, discriminatory, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected. *Unlike a book, a teacher cannot be inspected once...* These prophylactic contacts will involve excessive and enduring entanglement between state and Church.

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[12] This Court has consistently reaffirmed the *Lemon* test in several recent decisions concerning the scope and interpretation of the Establishment Clause. *See, Estate of Thornton v. Caldor, Inc.,* ____ U.S. ____, 105 S.Ct. 2914, 2917, 86 L.Ed.2d 557 (1985); *Wallace v. Jaffree, supra.* In *Wallace,* this Court applied only the "purpose" prong of the *Lemon* test to invalidate an Alabama law permitting a period of silence in the public schools "for meditation or silent prayer." ____ U.S. ____, 105 S.Ct. at 2491.

403 U.S. at 619 (emphasis supplied). *See, Robinson v. Di Censo,* 403 U.S. 603 (1971); *Board of Education v. Allen,* 392 U.S. 236 (1968).

Lemon teaches that the Act would result in "divisive political entanglements relating to religious issues," noting that political division along religious lines is one of the "principal evils against which the First Amendment was intended to protect." 403 U.S. at 622. *See, Stone v. Graham, supra* (where the Kentucky statute requiring the posting of a copy of the Ten Commandments in public classrooms was held unconstitutional partly because of its potential for political divisiveness).

The Establishment Clause does not require the total separation of Church and state in an absolute sense, as "[s]ome relationship between government and religious organizations is inevitable, *Lynch v. Donnelly, supra.* However, the Creationism Act creates the administrative and political entanglements identified in *Lemon. Id.* at 622-24. The specific provisions in the Act regarding the method of structuring curricula and using "non-religious" materials evidence the necessity for constant surveillance by the State to avoid the grosser aspects of such violations as part of the implementation of the Act. One anticipates there would be considerable need for state "vigilance" to determine the very existence of the "balanced" aspect of balanced treatment, and to monitor whether teachers are teaching "creation science" or "evolution science" as something more than "theory."

Moreover, the Act has already polarized the citizenry of Louisiana on religious grounds, as it did in Arkansas, and for many, it takes on the cast of a political issue. Such continued religious divisiveness is precisely the evil which the Establishment Clause is intended to prevent.

II. The Louisiana "Balanced Treatment" Statute Unconstitutionally Violates "Academic Freedom."

"Academic freedom" is a fundamental right that is safeguarded by the First and Fourteenth Amendments to the Constitution. *Keyishian v. Board of Regents,* 385 U.S. 589, 603 (1967). *Accord, Epperson v. Arkansas, supra,* 393 U.S. at 105. Academic freedom embraces the right of the teacher to teach and the right of the student to learn, as well as the taxpayers' interest in an educated citizenry. *See, Note,* "School Books, School Boards, and the Constitution," 80 *Col. L. Rev,* 1092 (1980), *Minarcini v. Strongsville City School District,* 541 F.2d 577 (6th Cir. 1976). The State can justify some coercive, regulatory activity to maintain its public schools, by expending large sums of tax dollars, employing numerous professionals and staff, and substantively limiting the associations and speech of students and teachers, because of its interest in the education of its citizens. *See, Zorach v. Clauson,* 343 U.S. 306 (1952); *McCollum v. Board of Education,* 333 U.S. 203 (1948).

However, this legitimate control over the operation of its public schools does not warrant state action which disrupts the educational process with unusual or irregular intervention. By the passage of the Creationism Act, the State of Louisiana has intervened in the orderly process of curriculum development in Louisiana, and has overridden the professional judgment of educators and scientists by enacting a statute which has no secular value or educational credibility.

The ultimate goal of academic freedom is education, and a state may not arbitrarily prescribe curriculum content that fosters propaganda or teaches orthodoxy to public school children or that has the effect of chilling academic discussion. *Epperson, supra,* 393 U.S. at 105. The Louisiana statute impermissably interferes with academic freedom by censoring the theory of evolution to the extent that it is not "balanced" with "creation science." This results in the arbitrary denial to

students their fundamental right to "acquire useful knowledge." *Meyer v. Nebraska,* 262 U.S. 390, 399 (1923), and teachers are deprived of the necessary freedom and discretion to insure that students receive the best possible education.

The Act, therefore, has the net effect of depriving public school students of their right to learn about evolution achieving indirectly what it cannot accomplish directly under the Constitution. *Epperson, supra.* The Fifth Circuit recognized this issue and its analysis is particularly cogent, especially in view of the stated *purpose* of the statute as *protecting* academic freedom:

> Although purporting to promote academic freedom, the Act does not and cannot, in reality, serve that purpose. Academic freedom embodies the principal that individual instructors are at liberty to teach that which they deem to be appropriate in the exercise of their professional judgment. The principal of academic freedom abjures state interference with curriculum or theory as antithetical to the search for truth. The Balanced Treatment Act is contrary to the very concept it avows...

Aguillard, 765 F.2d at 1257.

The Creationism Act freezes science education in Louisiana into a static framework which serves only religious purposes and no legitimate educational goals. It is this establishment of a politically "correct" way to approach the scientific disciplines which is the antithesis of academic freedom, and which amounts to state censorship.

CONCLUSION

In view of the foregoing analysis, the Louisiana statute requiring that "balanced treatment" be given to both "creation science" and "evolution science" is an unconstitutional violation of the Establishment Clause of the First Amendment and a violation of academic freedom which is protected by the First and Fourteenth Amendments to the Constitution.

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CERTIFICATE OF SERVICE

I, Philip E. Kaplan, hereby certify that a copy of the above and foregoing document has been mailed on this 15th day of August, 1986, to opposing counsel.

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